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Standing on Thin Ice: How Nebraska's Standing Doctrine Prevents the Majority of Surface Water Users from Obtaining Judicial Relief against Groundwater Users Interfering with Their Appropriations

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Note*

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I. INTRODUCTION

Nebraska water law consists of two distinct regulatory schemes for groundwater and surface water. Surface water users are regulated by a form of the prior appropriation doctrine administered by the Nebraska Department of Natural Resources (DNR).[1] Meanwhile, groundwater use is governed by local regulations promulgated by twenty-three natural resources districts (NRDs) that are divided by geographic lines based on Nebraska's river basins.[2] When examined in a vacuum these disparate regulatory schemes provide an illusion of adequacy. However, the developers of Nebraska water law did not provide a mechanism to regulate conflicts between groundwater users and the surface water users that depend upon groundwater that is discharged into Nebraska's streams. As noted in the legislative findings section of the Groundwater Management Act, the Nebraska legislature has enacted legislation in an attempt to mitigate some of these issues.[3] Despite this effort, the dueling regulatory schemes have still led to water quantity disputes that turn on the question of whether groundwater or surface water users have priority.[4]

The failure of surface water users to obtain legislative relief caused a number of aggrieved surface water users to look to the judiciary in hopes of resolving these disputes.[5] The Nebraska Supreme Court was historically reluctant to expand the scope of Nebraska water law beyond what the Nebraska legislature enacted.[6] However, in 2005 the court adopted a provision within the *Restatement Second of Torts* to deal with disputes arising in the context of hydrologically connected groundwater and surface water.[7] Adopting the *Restatement* approach provided an indication that the Nebraska Supreme Court might choose to fill other gaps left by the legislature. Since then the court

1. *See* NEB. CONST. art. XV, § 6; NEB. REV. STAT. § 61-206 (Reissue 2008).
2. *See* NEB. REV. STAT. § 2-3202 (Reissue 2012); Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 to -756 (Reissue 2010).
3. NEB. REV. STAT. § 46-703.
4. *See* Frenchman-Cambridge Irr. Dist. v. Dept. of Natural Res., 281 Neb. 992, 801 N.W.2d 253 (2011); Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Natural Res. Dist., 280 Neb. 533, 788 N.W.2d 252 (2010).
5. *Frenchman-Cambridge*, 281 Neb. 992, 801 N.W.2d 253; *Central*, 280 Neb. 533, 788 N.W.2d 252; Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).
6. *See In re* Metro. Utils. Dist. of Omaha, 179 Neb 783, 140 N.W.2d 626 (1966).
7. *Spear T Ranch*, 269 Neb. at 194, 691 N.W.2d at 132.

has not clarified the scope of what rights surface water users have in integrated management disputes. Furthermore, one major decision indicates that the court is hesitant to allow any litigation beyond that which is contained within the narrow confines of the adopted *Restatement* provision.[8]

This Note discusses how the Nebraska Supreme Court's treatment of standing doctrine in water law cases has made it difficult for a majority of surface water users to obtain judicial relief against groundwater users. Part II examines the incremental development of the conflict between some groundwater and surface water users, and the practical and judicial limitations of the court's decision in *Spear T Ranch, Inc. v. Knaub*. Part III discusses how the court's failure to distinguish between different types of governmental entities in its application of standing doctrine prevents surface water users from obtaining judicial relief. The Note concludes in Part IV by examining whether surface water users should be entitled to judicial relief and what political and judicial reforms can be adopted to ensure that surface water users are able to obtain such relief.

II. BACKGROUND

A. Water Development in Nebraska

Major Stephen Long, an early American explorer, once described portions of the land which would later become Nebraska as "unfit for cultivation, and of course uninhabitable by a people depending on agriculture . . . ."[9] However, nearly two centuries after Long's account was published, the State of Nebraska is one of the nation's largest producers of corn, beef, and other agricultural commodities.[10] Nebraska agriculture is largely successful because of irrigation, which according to a 2003 study, contributes over $3 billion to the Nebraska economy in a year with normal precipitation.[11] The vast majority of water used in Nebraska is used for irrigation purposes and, as of 2007, Nebraska irrigated more acres than any other state.[12]

8. *See Central*, 280 Neb. 533, 288 N.W.2d 252.
9. *Other Explorers Follow Lewis and Clark: Stephen H. Long*, NEBRASKASTUDIES.ORG, http://www.nebraskastudies.org/0400/frameset_reset.html?http://www.nebraskastudies.org/0400/stories/0401_0111.html (last visited Jan. 7, 2016), *archived at* http://perma.unl.edu/5DH5-XMZK.
10. *Nebraska Agriculture Fact Card*, NEBRASKA DEPARTMENT OF AGRIC. (Feb. 2015), http://www.nda.nebraska.gov/facts.pdf, *archived at* http://perma.unl.edu/E9CS-YJGT.
11. *Economics & Cost*, U. OF NEBRASKA-LINCOLN, http://water.unl.edu/cropswater/economic (last visited Jan. 8, 2016), *archived at* http://perma.unl.edu/64J5-GP5T.
12. *Water Use in Nebraska, 2005*, USGS, http://ne.water.usgs.gov/infodata/wateruse/ (last modified May 13, 2013, 1:58 PM), *archived at* http://perma.unl.edu/GAD7-B8YF; *Agricultural Irrigation*, U. OF NEBRASKA-LINCOLN, http://water.unl.edu/

The development of irrigation use in Nebraska began with the utilization of surface water to irrigate vegetables along the Platte River Valley to sell to pioneers traveling westward.[13] Surface water development continued after settlement and over 500,000 acres were irrigated with surface water by 1920.[14] Even though Nebraska's groundwater resources are more extensive, the development of groundwater resources for irrigation use occurred at a much slower rate until the mid-1950s.[15] In fact, there were still fewer groundwater-irrigated acres than surface water-irrigated acres as late as 1950.[16] Since then, the balance has dramatically shifted and 7.9 million acres are now irrigated with groundwater.[17] According to a 2007 estimate, 85% of irrigation water withdrawals are derived from groundwater pumping.[18]

While there are roughly 7.9 million acres irrigated with groundwater, the current number of surface water-irrigated acres is unclear.[19] A history of surface water development in Nebraska indicates that, in addition to the 505,000 surface water-irrigated acres existing as of 1920, 170,000 surface water-irrigated acres were added by New Deal-era projects, and 235,000 such acres were added as a result of the Pick-Sloan Missouri Basin Program.[20] Based solely on these estimates, there are now 910,000 surface water-irrigated acres in Nebraska.[21] It is, however, unknown how many acres were added by small-scale surface water diversions or how many acres were later permanently retired. Furthermore, there are active surface water rights that may not be utilized in a given year due to lack of water or a farmer's participation in a temporary retirement program.[22] This may explain why a 2007 University of Nebraska estimate placed the number of surface water-irrigated acres at just over 565,000 acres.[23] However, it is unclear what methodology was used to arrive at this

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cropswater (last visited Jan. 7, 2016), *archived at* http://perma.unl.edu/9K8T-3KZ3.

13. JESSE T. KORUS ET AL., GROUNDWATER ATLAS OF NEBRASKA 2 (R.F. Diffendal, Jr. ed., rev. 3d ed. 2013).
14. *Id.* at 7.
15. *Id.* at 1.
16. *Id.*
17. *Agricultural Irrigation*, *supra* note 12.
18. *Water Use in Nebraska, 2005*, *supra* note 12.
19. *Agricultural Irrigation*, *supra* note 12.
20. KORUS ET AL., *supra* note 13, at 7.
21. *See id.*
22. *See* Art Hovey, *State Orders Republican Reservoir Releases*, LINCOLN J. STAR (Apr. 3, 2013, 7:00 AM), http://journalstar.com/news/local/state-orders-republican-reservoir-releases/article_32ab3802-b0c3-5b47-8d89-56f4fc80dca8.html, *archived at* http://perma.unl.edu/7GVS-82QR; U.S. DEP'T OF AGRIC. FARM SERV. AGENCY, PROGRAMMATIC ENVIRONMENTAL ASSESSMENT (2005), *archived at* http://perma.unl.edu/NPW7-JCCS.
23. *Agricultural Irrigation*, *supra* note 12.

estimate. Though the actual number is uncertain, it is probable that the actual number of surface water-irrigated acres in Nebraska varies somewhere between 565,000 and 910,000.[24]

The varying rates of development for groundwater and surface water appear to coincide with legislative attempts to regulate these respective users. The Nebraska Supreme Court alluded to this when it discussed a brief history of Nebraska water law in a 1966 dispute.[25] The court noted that the basis of Nebraska's modern surface water regulation was adopted in 1895.[26] Meanwhile, the first statutory attempt to regulate groundwater use was not adopted until 1957.[27] Eventually the State of Nebraska created twenty-three distinct local governmental entities and gave them the authority to regulate groundwater.[28] However, Nebraska's attempt to regulate groundwater with local governmental subdivisions did not prevent future legal disputes from arising between ground and surface water users.

B. *Spear T. Ranch, Inc. v. Knaub*

The primary issue in *Spear T Ranch, Inc. v. Knaub*, a case decided by the Nebraska Supreme Court in 2005, was whether surface water users had a common law cause of action against groundwater users that interfered with their appropriations.[29] The plaintiff was a ranch in Morrill County, Nebraska, that had historically watered cattle and irrigated crops using a surface water diversion from Pumpkin Creek.[30] Surface water availability declined following the development of hydrologically connected groundwater irrigation in the Pumpkin Creek basin.[31] Spear T Ranch filed suit against various groundwater irrigators and requested an injunction on future groundwater withdrawals and compensation for the loss of its appropria-

24. The scope of this Note's inquiry is generally limited to standing and how it impacts surface water entities. It is true that there are individuals appropriating water from Nebraska's streams without the assistance of surface water entities. However, surface water entities are the focus of the analysis here because they possess active irrigation rights for approximately 730,000 acres in Nebraska. *Nebraska Surface Water Rights Data Retrieval*, DEPARTMENT OF NAT. RESOURCES, http://dnr.nebraska.gov/swr/nebraska-surface-water-rights-data-retrieval (last modified Oct. 9, 2015, 10:02 PM), *archived at* http://perma.unl.edu/L5VZ-M22T. This exceeds the estimate of surface water-irrigated land in 2007 by 165,000 acres. Assuming that there are surface water rights to irrigate 910,000 acres in Nebraska, approximately 80% of surface water rights in Nebraska are owned by these entities. *Id.*; KORUS ET AL., *supra* note 13, at 7.
25. *In re* Metro. Utils. Dist. of Omaha, 179 Neb. 783, 140 N.W.2d 626 (1966).
26. *Id.* at 798, 140 N.W.2d at 635.
27. *Id.*
28. KORUS ET AL., *supra* note 13, at 2.
29. *See* Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).
30. *Id*. at 181, 691 N.W.2d at 123.
31. *Id.*

tion.[32] Although the Nebraska Supreme Court determined Spear T Ranch did not properly bring the case, the court did not dismiss the action.[33] Instead it elected to adopt a provision from the *Restatement (Second) of Torts* that imposes liability on groundwater users whose withdrawal has "a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water."[34]

The Nebraska Supreme Court's decision in *Spear T Ranch* was unprecedented. At least one prior decision indicated the court was not interested in infringing upon the state legislature's authority to regulate groundwater and surface water disputes.[35] Furthermore, the *Restatement* has not been adopted by many jurisdictions and it has been seldom litigated in states where it has been adopted.[36] The novelty of the court's decision could be construed as a monumental change in Nebraska's judicial firmament. However, some were skeptical that the adoption of the *Restatement* would lead to dramatic changes in Nebraska water litigation.[37] This is because there are significant practical barriers to litigating under the *Restatement*. First, any case that would arise under the *Restatement* would require expensive and extensive expert research and testimony, thus the party with the best expert would have a tremendous advantage.[38] Additionally, the lack of prior case law makes it unclear how courts would apply the *Restatement* provisions to actual situations.[39] In short, the uncertainty and expense of litigation impose significant economic barriers to litigation.[40]

Regardless of the potential practical issues that could effectively bar litigation under the *Restatement*, *Spear T Ranch* still appeared to be a victory for surface water users seeking judicial relief. It validated the idea that surface water irrigators hold a right that can be asserted against groundwater users that interfered or were interfering with their appropriations. Still, it was unclear whether the decision in *Spear T Ranch* was an indication Nebraska courts would be more willing to allow surface water users or holders of surface water rights to actually recover in tort or challenge governmental actions. At least

32. *Id.*
33. *Id.*
34. *Id.* at 189, 691 N.W.2d at 129 (citing RESTATEMENT (SECOND) OF TORTS § 858(1)(c) (1979)).
35. *See In re* Metro. Utils. Dist. of Omaha, 179 Neb. 783, 140 N.W.2d 626 (1966).
36. Joseph A. Kishiyama, Note, *The Prophecy of Poor Dick: The Nebraska Supreme Court Recognizes a Surface Water Appropriator's Claim Against a Hydrologically Connected Ground Water User in* Spear T Ranch, Inc. v. Knaub, 85 NEB. L. REV. 284, 303–04 (2006).
37. *See, e.g.*, *id.*
38. *Id.* at 302.
39. *Id*. at 303–04.
40. *Id.* at 309.

one high profile case decided after *Spear T Ranch* indicates that the Nebraska Supreme Court views the case as a narrow decision that does not extend far beyond those particular facts.[41] This Note discusses *infra* how the Nebraska Supreme Court's application of standing doctrine in *Central Nebraska Public Power & Irrigation District v. North Platte Natural Resources District* (*Central*) affects the scope of the *Spear T Ranch* decision and thus minimizes the likelihood of potential recovery by surface water irrigators.

C. Introduction to Standing Doctrine

Standing doctrine is said to have two purposes in the preservation of our legal system and governmental structure:[42] First, it prevents courts from overreaching into areas governed by the other branches of government.[43] Justice Alito was cognizant of this effect when he wrote, "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."[44] Second, standing doctrine serves to ensure the long-term stability of our adversarial system.[45] Justice Brennan once wrote that whether standing exists depends upon whether "the [parties] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . ."[46]

In federal courts, standing doctrine is the product of both prudential rules and limitations found in Article III of the United States Constitution.[47] In order to establish standing under Article III "the plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."[48] If the minimum standards of Article III are not met there is nothing, not even an act of Congress, that will allow a federal court to decide the case.[49] Prudential standing, meanwhile, is purely the byproduct of federal court discretion and can be

41. *See* Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Natural Res. Dist., 280 Neb. 533, 788 N.W.2d 252 (2010).
42. *See* Clapper v. Amnesty Intern. USA, 133 S. Ct. 1138 (2013).
43. *See id.* at 1146 (citations omitted).
44. *Id.*
45. *See* Baker v. Carr, 369 U.S. 186 (1962).
46. *Id.* at 204.
47. *See* Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).
48. *Id.* at 1386 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
49. Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Warth v. Sedlin, 422 U.S. 490, 498 (1975)).

modified or abrogated by Congress.[50] Examples of prudential standing include "the general prohibition on a litigant's raising another person's legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . . ."[51]

Nebraska's standing restrictions appear to mirror the standards developed in the federal courts to satisfy Article III standing. This is evident given the Nebraska Supreme Court's summary of its standing doctrine in 2010:

> [A] litigant first must clearly demonstrate that it has suffered an "injury in fact." That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by favorable decision.[52]

In summary, Nebraska courts require that: (1) the plaintiff be injured or demonstrate future injury; (2) the injury not be abstract; (3) the challenged action be traceable to the harm; and (4) the court have the ability fix the injury.[53]

While the similarity between Nebraska's standing doctrine and federal standing doctrine is useful for comparative purposes, adherence to the federal rule is not required by any authority, apart from historic case law, that governs the Nebraska judiciary. Article III of the Constitution has never bound the states and the Nebraska Constitution does not actually impose any comparable requirements on the Nebraska judiciary.[54] As a result, Nebraska's standing doctrine is purely prudential and can be overruled by the legislature at any point. While this may not be explicitly stated, the fact that standing doctrine is not actually required indicates that standing doctrine only exists in Nebraska because of policy determinations made by the Nebraska Supreme Court.

III. STANDING IN WATER LAW CASES

In recent years, numerous Nebraska water law cases have been halted by the Nebraska Supreme Court due to lack of standing.[55]

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50. *Id.*
51. *Lexmark*, 134 S. Ct. at 1386 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).
52. Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Natural Res. Dist., 280 Neb. 533, 542, 788 N.W.2d 252, 260 (2010) (citations omitted).
53. *Id.*
54. *See* U.S. CONST. art. III, § 2; NEB. CONST. art. 5 § 1–31.
55. *See In re* Application A-18503, Water Division 2-D (*Niobrara 2*), 286 Neb. 611, 838 N.W.2d 242 (2013); Frenchman-Cambridge Irr. Dist. v. Dept. of Natural Res., 281 Neb. 992, 801 N.W.2d 253 (2011); Metro. Utils. Dist. v. Twin Platte Natural

Most of these cases were dismissed for one of two reasons: first, the Nebraska Supreme Court has determined the entity in question was asserting rights held by third parties;[56] second, the court has held the alleged injury was too remote or speculative to be adjudicated.[57]

While the issue of speculative or attenuated injury versus actual or imminent injury is interesting and should be addressed in the future, this Note focuses its attention on the third-party standing issue and its application to different types of governmental entities. While the Nebraska Supreme Court appears to have properly decided that NRDs cannot assert the interests of its constituents, the court may have erred when it rigidly applied the same standard to irrigation districts and public power and irrigation districts, hereinafter referred to as "surface water entities." The nature and purpose of these types of entities are completely different and should not be treated in an identical manner. In ignoring this distinction, the Nebraska Supreme Court increased the likelihood that surface water irrigators will be unable to obtain judicial relief.[58]

This Part begins in section III.A with a discussion of cases governing NRDs and their standing to challenge governmental actions. Section III.B then discusses the court's application of standing doctrine to surface water entities. Section III.C delves into the distinctions between the nature of surface water entities and NRDs. Finally, this Part concludes in section III.D with a discussion of how the court's application of standing doctrine and treatment of *Spear T Ranch* essentially prevents the majority of surface water users from obtaining judicial relief against groundwater users.

A. Natural Resource Districts and Standing to Challenge Governmental Actions

The issue of standing occasionally arises when a natural resources district attempts to challenge governmental actions involving surface water or groundwater in an effort to preserve its own interests or those of its constituents. The Nebraska Supreme Court has only al-

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Res. Dist., 250 Neb. 442, 550 N.W.2d 907 (2011); *Central*, 280 Neb. at 533, 788 N.W.2d at 252.

56. *See Central*, 280 Neb. at 533, 788 N.W.2d at 252; *Twin Platte*, 250 Neb. at 442, 550 N.W.2d at 907.

57. *See Central*, 280 Neb. at 533, 788 N.W.2d at 252; *Frenchman-Cambridge*, 281 Neb. at 992, 801 N.W.2d at 253; *Niobrara 2*, 286 Neb. at 611, 838 N.W.2d at 242.

58. This Note does not address any legal methods that could be used to potentially get around these standing issues. Though there may be legitimate procedural avenues to avoid these hurdles, they would be unnecessary if courts applied standing doctrine differently.

lowed one of these cases to move forward and has properly dismissed the rest for lacking standing.[59]

There are two cases that serve to illustrate the application Nebraska's standing doctrine to natural resources districts: *Metropolitan Utilities District v. Twin Platte Natural Resources District* (*Twin Platte*) and *Middle Niobrara Natural Resources District v. Department of Natural Resources* (*Niobrara 1*). Each case exemplifies the types of disputes often presented and how the standing doctrine applies.[60]

In *Twin Platte*, the Twin Platte Natural Resources District (TPNRD) attempted to intervene when the Metropolitan Utilities District sought a permit to divert surface water and induce underground storage.[61] TPNRD argued it had standing to challenge this administrative action because: (1) it has statutory authority to act in the public interest; and (2) it is responsible for the welfare of its constituents and several of its constituents might be harmed by this action.[62] The Nebraska Supreme Court disagreed and stated that their public interest mandate did not give statutory standing to TPNRD to intervene on behalf of its constituents.[63] Furthermore, TPNRD did not possess surface water rights and could not meet the injury standard necessary to bring forth the lawsuit on its own.[64] Therefore, the court dismissed due to lack of standing.[65]

In *Niobrara 1*, the Nebraska Supreme Court concluded there are limited circumstances where a natural resources district could, in fact, be sufficiently harmed to challenge governmental actions.[66] In this case the Middle Niobrara Natural Resources District (MNNRD) challenged the decision by the DNR to designate part of the Niobrara River as "fully appropriated."[67] MNNRD argued that it was an "interested person" under Nebraska Revised Statute Section 46-713(2) and had standing to challenge the DNR's decision because it would be forced to abide by more stringent statutory requirements that would require MNNRD to spend more public funds.[68] The court agreed with MNNRD's contention and noted that failing to allow the challenge would "leave political subdivisions at the mercy of superior agencies with no redress for actions that improperly or arbitrarily and capri-

59. *See* Middle Niobrara Natural Res. Dist. v. Dep't of Natural Res. (*Niobrara 1*), 281 Neb. 634, 799 N.W.2d 305 (2011).
60. *Id.*; *Niobrara 2*, 286 Neb. at 611, 838 N.W.2d at 242; *Twin Platte*, 250 Neb. at 442, 550 N.W.2d at 907.
61. *Twin Platte*, 250 Neb. at 444, 550 N.W.2d at 909.
62. *Id.* at 445, 550 N.W.2d at 910.
63. *Id.* at 449, 550 N.W.2d at 912.
64. *Id.* at 448, 550 N.W.2d at 911.
65. *Id.*
66. *See Niobrara 1*, 281 Neb. 634, 799 N.W.2d 305 (2011).
67. *Id*. at 636, 799 N.W.2d at 308.
68. *Id.* at 645–46, 799 N.W.2d at 314–15.

ciously require them to spend public funds."[69] MNNRD was given standing to sue and the case was decided on the merits.[70]

The decisions reached in *Twin Platte* and *Niobrara 1* were relatively straightforward and provide a predictable roadmap for future litigation involving natural resources districts. In *Twin Platte*, the court correctly determined that TPNRD did not have standing to bring an action on behalf of its constituents without a clear legislative grant of standing.[71] Meanwhile, the court in *Niobrara 1* acknowledged that administrative actions can cause harm to natural resources districts and opened the door to limited challenges of administrative actions on that basis.[72] As discussed in the remainder of this Part, the problem is that the court broadly applied these decisions to surface water entities. The court's far-reaching application ignored the nature of surface water entities and essentially prevented the majority of surface water users from recovering against groundwater users.

B. Surface Water Entities and Standing

The most detailed decision dealing with standing and surface water entities is *Central Nebraska Public Power and Irrigation District v. North Platte Natural Resources District* (*Central*).[73] Five years following the decision in *Spear T Ranch*, the Central Nebraska Public Power and Irrigation District (CNPPID) challenged regulations promulgated by the North Platte Natural Resources District (NPNRD).[74] CNPPID filed suit under the Administrative Procedures Act (APA) in an effort to force NPNRD to enact more restrictive groundwater pumping regulations in the Pumpkin Creek basin, the same basin where *Spear T Ranch* originated.[75] CNPPID's theory behind the suit was that pumping restrictions at the level proposed by NPNRD were not restrictive enough to restore streamflows in Pumpkin Creek to their previous levels.[76] CNPPID alleged it was harmed by a reduction in streamflow caused by groundwater withdrawals because those withdrawals reduced the amount of water entering its reservoir system, and the lack of water interfered with its ability to carry out its operations.[77]

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69. *Id.* at 647, 799 N.W.2d at 315.
70. *Id.*
71. *See* Metro. Utils. Dist. v. Twin Platte Natural Res. Dist., 250 Neb. 442, 550 N.W.2d 907 (1996).
72. *See Niobrara 1*, 281 Neb. at 634, 799 N.W.2d at 305.
73. 280 Neb. 533, 788 N.W.2d 252 (2010).
74. *Id.* at 536, 788 N.W.2d at 256.
75. *Id.* at 537, 788 N.W.2d at 257.
76. *Id.* at 536, 788 N.W.2d at 256.
77. *Id.*

The Nebraska Supreme Court concluded that CNPPID failed to allege sufficient injury to bring the action.[78] The court's conclusion consisted of two main prongs: (1) injury to the claimant; and (2) actual, non-speculative injury capable of judicial redress. First, the court held that CNPPID did not allege it had actually suffered an injury because it was acting as an agent for third parties and the third parties were the only ones harmed by the alleged injuries.[79] This conclusion was enough to doom the claim because, as the court noted, "a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties."[80] The court also found that CNPPID failed the second prong of the standing test because the alleged injuries were too attenuated and speculative, and that any potential injury suffered by CNPPID would not be redressable by the court.[81]

C. Contrast Between Natural Resources District Standing Cases and *Central*

While the decisions in *Twin Platte* and *Niobrara 1* appeared to be properly decided, the court's standing analysis in *Central* is problematic because its application is unnecessarily rigid. It is true that Nebraska case law has established that governmental entities cannot assert the interests of third parties.[82] It is equally true that the Nebraska Supreme Court might have been able to properly dismiss this case by stating that Central did not allege a legally redressable injury.[83] The problem is that the court did not appear to distinguish between a natural resources district's relationship with its constituents and a surface water entity's relationship with its irrigators. The nature of the relationship is completely different; viewing irrigation districts as a third-party agent for its constituents is a fundamental error in the court's decision.

The court correctly decided *Twin Platte* because TPNRD did not possess an interest in surface water rights that would allow them to challenge the DNR's action.[84] TPNRD and the other twenty-two natural resources districts in Nebraska were created by the legislature to promote certain conservation activities, manage water resources, enact flood control measures, and perform other statutorily granted

78. *Id.* at 547, 788 N.W.2d at 263.
79. *Id.* at 542–43, 788 N.W.2d at 260–61.
80. *Id.* at 542, 788 N.W. 2d at 260 (citing Warth v. Seldin, 422 U.S. 490 (1975)).
81. *Id.* at 544–45, 788 N.W.2d at 262.
82. *See, e.g.*, Metro. Utils. Dist. v. Twin Platte Natural Res. Dist., 250 Neb. 442, 550 N.W.2d 907 (1996).
83. *See Central*, 280 Neb. at 545, 788 N.W.2d at 262.
84. *Twin Platte*, 250 Neb. at 448, 550 N.W.2d at 911.

functions.[85] Although a natural resources district like TPNRD may be required to regulate water usage, a natural resources district does not, as a part of its very nature, create and continue to possess rights in the groundwater it is regulating or the surface water its constituents utilize.[86] A natural resources district may have constituents and board members that have a direct interest in either surface or groundwater that is being regulated by the natural resources district or the state.[87] However, a natural resources district exists as a local groundwater regulatory body and does not, as necessary part of its creation, automatically possess ownership interests in groundwater or surface water rights.[88]

It is true that natural resources districts may occasionally obtain interests in groundwater, surface water appropriations, or instream flow rights in order to properly conduct their other statutory functions. This occurred with the Upper Republican Natural Resources District (URNRD) when it purchased a large amount of irrigated cropland, obtained an interest in the groundwater underneath it, and used that groundwater interest to develop a streamflow augmentation project.[89] The Middle Republican Natural Resources District (MRNRD) also purchased surface water from an irrigation district for a similar reason.[90] However, neither URNRD nor MRNRD automatically possessed an interest in the groundwater or surface water right as a necessary part of its formation or continued existence.

In direct contrast with natural resources districts, surface water entities own the actual rights in the surface water they distribute to farmers, use for power generation purposes, or both.[91] A surface water entity exists to use water for power generation purposes and distribute water to the farmers that possess land within the district.[92]

85. NEB. REV. STAT. § 2-3229 (Reissue 2010).
86. *See* Groundwater Management Act, NEB. REV. STAT. §§ 46-701 to -756 (Reissue 2010) (imposing duties on natural resources districts to regulate groundwater in certain situations).
87. *MRNRD Candidates Talk Water*, MCCOOK DAILY GAZETTE (Oct. 31, 2014), http://www.mccookgazette.com/story/2133797.html, *archived at* http://perma.unl.edu/A8KJ-Z6Z2.
88. *See* NEB. REV. STAT. § 61-206 (Reissue 2010); Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 to -756.
89. *See* Russ Pankonin, *First Water Flows from Rock Creek Augmentation Project*, IMPERIAL REPUBLICAN, http://www.imperialrepublican.com/index.php?option=com_content&id=5319:first-water-flows-from-rock-creek-augmentation-project (last visited Oct. 20, 2015), *archived at* http://perma.unl.edu/JGX8-WC4C.
90. Associated Press, *2nd Nebraska District to Sell Water Rights*, TOPEKA CAPITAL-JOURNAL (Mar. 31, 2006), http://cjonline.com/stories/033106/bre_water.shtml, *archived at* http://perma.unl.edu/V2HL-SHRA.
91. *See* Cent. Neb. Pub. Power & Irr. Dist. v. North Platte Natural Res. Dist., 280 Neb. 533, 543, 788 N.W.2d 252, 261 (2010).
92. *See About CNPPID*, CENT. NEBRASKA PUB. POWER & IRRIGATION DISTRICT, http://www.cnppid.com/about-cnppid/ (last visited Oct. 20, 2015), *archived at* http://

In addition, much of the land that is irrigated with surface water would not have been irrigated by surface water if a surface water entity did not exist. For example, the Google Maps distance measurement tool shows that the Driftwood Canal south of McCook, Nebraska, carries water over six-and-a-half miles south of the Republican River.[93] The irrigation district that supplied the water holds the right to appropriate and divert water to areas like this.[94] It is unlikely these fields would be irrigated with surface water if the irrigation district did not construct the necessary infrastructure to deliver the water. Since the water right would likely not exist without the surface water entity, the formation of the entity facilitated the creation of any surface water rights the farmers possess. Conversely, the surface water entity would eventually cease to exist if all of the farmers failed to use the delivered water or if the entity could not deliver the water for a certain number of consecutive years.[95]

Given the necessarily mutual relationship between surface water entities and surface water users, it is reasonable to conclude that CNPPID would be negatively impacted by being unable to obtain the water they have the right to obtain. This is opposite of natural resources districts, like TPNRD, that have no direct connection to the surface water rights they were using to challenge the DNR's action.[96] Yet the decision in *Central* indicates that the Nebraska Supreme Court chose to treat the constituents of natural resources districts and the irrigators of surface water entities in exactly the same fashion. The court ignored the actual interests that the entities had in the water and its distribution, and failed to examine the nature of the relationships between the entities and their customers. While it is possible CNPPID did not meet the minimum standing requirements in this suit, it makes little sense to conclude an entity that exists solely to use and distribute water is not harmed by others interfering with its ability to obtain water.[97]

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perma.unl.edu/R484-AKAR; *About: Frenchman Cambridge Irrigation District*, FRENCHMAN CAMBRIDGE IRRIGATION DIST., http://fcidwater.com/home_files/Page379.htm (last visited Oct. 20, 2015), *archived at* http://perma.unl.edu/XN6K-49TY.

93. *Culbertson, NE 69024*, GOOGLE MAPS, https://www.google.com/maps/place/Culbertson,+NE+69024/@40.085669,-100.8799494,38078m/data=!3m1!1e3!4m2!3m1!1s0x87759b0b8e1d13a5:0x9a981ad45cabe987 (last visited Oct. 20, 2015), *archived at* http://perma.unl.edu/EAF4-NRJC.

94. *Central*, 280 Neb. at 543, 788 N.W.2d at 261.

95. *See* NEB. REV. STAT. § 46-229 (Reissue 2010); NEB. REV. STAT. § 46-229.04 (Reissue 2010).

96. Metro. Utils. Dist. v. Twin Platte Natural Res. Dist., 250 Neb. 442, 448, 550 N.W.2d 907, 911 (2011).

97. *See Central*, 280 Neb. at 533, 788 N.W.2d at 252.

D. Nebraska's Standing Doctrine Prevents Most Surface Water Users from Obtaining Relief

The court's designation of CNPPID as an agent for third parties appears to have had a practical impact on CNPPID's future ability to bring a tort claim against groundwater irrigators under the *Restatement* approach adopted in *Spear T Ranch*. In CNPPID's brief, it cited *Spear T Ranch* and argued that it is "'untenable' that a property right could exist for purposes of tort law, but not for purposes of APA review of the NRD's order."[98] The court responded by reiterating its holding that "Central's 'right' to use water is based in interests of others, unlike the Pumpkin Creek surface water irrigators who were the plaintiffs in *Spear T Ranch*."[99] The court then noted that unless CNPPID had an injury for standing purposes it could not have an injury as required under the *Restatement* analysis.[100] Therefore, unless the third-party designation goes away, an attempt by a surface water entity to bring a case under the *Restatement* approach will probably not be successful.

Under the current scheme, surface water entities are precluded from individually seeking most forms of judicial relief. They are unable to successfully challenge governmental actions that impact water quantity because alleging an inability to provide a full amount of water to their customers does not constitute an injury.[101] Furthermore, their designation as a third-party agent likely precludes them from obtaining relief under the *Restatement* approach.[102] Therefore, the judicial options that would allow surface water entities to obtain relief against groundwater irrigators appear limited or non-existent.

Unfortunately for surface water users, the entities that supply surface water to farmers are more likely to have the financial capital necessary to finance the litigation. As noted in *Poor Dick*, the economic barriers to litigating under the *Restatement* approach may be too large for one person to overcome.[103] Additionally, surface water entities possess the water rights to the majority of surface water irrigated acres in Nebraska.[104] The sheer volume of water rights held by these entities makes it more likely that they would be able to satisfy the injury standard necessary to obtain standing. However, it is unclear

98. *Id.* at 546, 788 N.W.2d at 263.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Kishiyama, *supra* note 36, at 309.
104. *Nebraska Surface Water Rights Data Retrieval*, *supra* note 24.

whether a single member of an irrigation district would be as likely to successfully obtain standing.[105]

The United States Supreme Court recently discussed whether individual ranchers in an irrigation district had standing to challenge a governmental action affecting water quantity.[106] While the Supreme Court allowed the ranchers to maintain standing in the pleadings stage, it left open the possibility that standing issues could bar them from continuing the litigation after facts were presented.[107] Standing issues could theoretically arise in this instance because individuals receiving water from a surface water entity would only receive a small portion of the total amount of water delivered by the surface water entity.[108] Therefore, in order to have a substantial effect on an individual's water supply, there would have to be a massive increase in the total amount of water available as a consequence of judicial action.[109] Although the chance to delve into this issue has not yet occurred in Nebraska, the difference between a collective and individual impact of a regulation or groundwater withdrawals could prevent an individual member of a surface water entity from seeking relief against groundwater irrigators or regulatory bodies.

In summary, surface water entities are in a better financial position to litigate groundwater and surface water disputes than their individual members, but the Nebraska Supreme Court's interpretation of third-party standing essentially precludes surface water entities from pursing relief. Even if the litigation can be financed individually, it could be even harder for an individual, rather than a surface water entity, to meet other necessary standing requirements to challenge a governmental action or bring suit against groundwater irrigators. Given that surface water entities hold the majority of surface water rights in Nebraska, this practically prevents the majority of surface water users from successfully pursuing litigation.

IV. IS IT GOOD PUBLIC POLICY TO ALLOW SURFACE WATER USERS TO PURSUE JUDICAL RELIEF?

Although the Nebraska Supreme Court appears to be denying surface water irrigators judicial relief on improper grounds, it is not a foregone conclusion that surface water irrigators should be able to obtain relief from the judicial branch. Surface water irrigators would

105. *See* Bennett v. Spear, 520 U.S. 154 (1997) (citations omitted) (examining partially the government's argument that an aggregate decline in the amount of surface water would not necessarily impact an individual petitioner and finding "general allegations of fact" were sufficient at the early stage of the litigation).
106. *Id.* at 167–68.
107. *Id.*
108. *Id.*
109. *Id.*

argue that they deserve access to the judiciary because they have legal rights to the water they use and should be able to assert those rights against those interfering with those rights.[110] Meanwhile, groundwater irrigators would argue that it is in the state's economic interests to maximize groundwater irrigation and legislative inaction does not give the judiciary the right to intervene.[111] The following analysis examines the arguments likely to be made by surface water irrigators in section IV.A, groundwater irrigators in section IV.B, and concludes with a brief policy summary in section IV.C.

A. Arguments in Favor of Judicial Intervention

Since the 1800s, the Nebraska legislature has recognized that surface water users have rights that are enforceable against others.[112] While the Nebraska legislature has never decided whether surface water rights can be asserted against groundwater users, the Nebraska Supreme Court did so in *Spear T Ranch, Inc. v. Knaub*.[113] While the extent to which these rights can be enforced is unclear, the clear result of *Spear T Ranch* is that surface water users have rights that can theoretically be asserted against groundwater users.[114] Like the plaintiff in *Central*, surface water users might argue that the recognition of this right should be enough to allow holders of surface water rights to assert their interests against individuals that interfere with their rights or governmental entities whose actions enable said interference.[115]

Unlike in hydrologically connected surface water and groundwater disputes, water quantity disputes between surface water users are resolved by a system administered by the DNR.[116] If one surface water user's higher priority water right is being interfered with by another surface water user, then the DNR can force the interferer to cease the interfering activity.[117] If it is not possible to solve this dispute in the

110. *See* Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Natural Res. Dist., 280 Neb. 533, 546, 788 N.W.2d 252, 261 (2010).

111. *See* Supplemental Brief for Nebraska Farm Bureau Federation as Amicus Curiae, Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005) (No. S-03-000789), 2004 WL 5478816; Supplemental Brief for Nebraska Groundwater Management Coalition as Amicus Curiae, *Spear T Ranch*, 269 Neb. 177, 691 N.W.2d 116 (No. S-03-000789), 2004 WL 5478815.

112. *See In re* Metro. Utils. Dist. of Omaha, 179 Neb 783, 798, 140 N.W.2d 626, 635–36 (1966) (citing Laws 1895, c. 69, ss. 20, 49, pp. 249, 262; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904)).

113. 269 Neb. 177, 691 N.W.2d 116.

114. *See id.*

115. *See Central*, 280 Neb. at 533, 788 N.W.2d at 252.

116. NEB. REV. STAT. § 61-206 (Reissue 2010).

117. *See id.*

confines of the administrative system, then the judiciary is the last resort.[118]

In direct contrast with the water administration system, the judiciary is the first and last resort for enforcement of whatever rights surface water users have against groundwater users. The legislature's failure to intervene means judicial intervention is the only way to determine the scope of those rights. By denying surface water users judicial relief against groundwater users and preventing challenges to unfavorable regulations, the Nebraska judiciary denies the majority of surface water users the only relief potentially available. If the Nebraska judiciary declines to hear these disputes, then whatever rights surface water irrigators have against groundwater irrigators are practically meaningless.

Some would argue that the judiciary is not the place to make policy determinations of this nature. Surface water irrigators would note that, while political relief is theoretically available, surface water irrigators are unlikely to obtain assistance from the Nebraska legislature. This is because the overwhelming majority of irrigators in Nebraska irrigate with groundwater.[119] Groundwater irrigators, therefore, are a larger and more powerful constituency in Nebraska than surface water irrigators. The relative power and size of groundwater irrigators makes it unrealistic to expect legislative action that explicitly disadvantages groundwater irrigators on a statewide level. Therefore, the judiciary is the only practical recourse for surface water irrigators seeking the preservation of their rights.

B. Arguments Against Allowing Surface Water Irrigators to Obtain Judicial Relief

As noted previously, groundwater irrigation makes up the vast majority of Nebraska's irrigated acres.[120] While surface water irrigators would see this as a reason to involve the judiciary, groundwater irrigators may argue that the number of groundwater irrigated acres, and the corresponding economic impact, means that the judiciary should not get involved.[121] Though market conditions are fluid and Nebraska's agricultural economy is significantly more diverse, assume for a moment that the price of corn is $4.50 per bushel, the average irrigated corn acre in Nebraska produces 190 bushels, and all irrigated acres are planted to corn. Further assume that there are 7.9 million groundwater irrigated acres in Nebraska, thus the market value of corn grown using groundwater irrigation would be approxi-

118. *See* State *ex rel*. Cary v. Cochran, 183 Neb. 163, 292 N.W.2d 239 (1940).
119. *Agricultural Irrigation*, *supra* note 12.
120. *Id.*
121. *See* Supplemental Brief for Nebraska Farm Bureau Federation as Amicus Curiae, *supra* note 111.

mately $6.7 billion. Meanwhile, if there are one million surface water irrigated acres in Nebraska, the total value of corn grown with surface water would be $855 million. While both forms of irrigation create a large amount of revenue, in pure dollar value, groundwater irrigation is significantly more valuable to Nebraska than surface water irrigation.

Groundwater users argue that if surface water users are allowed to sue groundwater users or challenge groundwater-friendly regulations it would severely impact the Nebraska economy.[122] The current economic impact of groundwater irrigation is so high that allowing a group of disaffected farmers or surface water entities access to the judicial system could unnecessarily hurt Nebraska farmers and economic sectors that depend upon them.[123] Meanwhile, increased litigation would result in an exorbitant amount of court costs, which are then passed onto taxpayers and individual farmers.[124] It could also lead to reduced property tax revenue received by local governments, diminished income to Nebraska farmers, and increased uncertainty and administrative costs.[125]

In addition to the economic impact, groundwater users might also point out that judicial decisions in this area would constitute reaching into an area normally regulated by the legislature. In 1966, the Nebraska Supreme Court declined to extend statutes that governed surface water to regulation of groundwater use.[126] Most areas of water law, including groundwater regulation, have been addressed in varying degrees by the Nebraska legislature at one time or another.[127] Groundwater users could argue that just because there is a political dispute over management of hydrologically connected water resources does not mean that the judiciary should intervene. In fact, they could flip the argument and assert that the political nature of this dispute should be a reason to avoid such litigation all together.

C. Policy Summary

As a policy matter, whether the judiciary should intervene in disputes between ground and surface water irrigators is a difficult question that should be considered carefully. Coming to a conclusion would involve weighing several important factors. On one hand, respect for the political system and the economic costs of potential litigation weigh heavily in favor of limiting litigation against groundwater

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *In re* Metro. Utils. Dist. of Omaha, 179 Neb 783, 799–802, 140 N.W.2d 626, 636–38 (1966).
127. *See generally* NEB. REV. STAT. Ch. 46.

users. On the other hand, judicial intervention is the only way surface water users can protect their already-established rights against groundwater users. Regardless of the outcome of this policy debate, it is clear the Nebraska Supreme Court has taken steps that, in isolation, could be perceived as attempts to appease both sides. It has both affirmed the existence of a common law right against groundwater users, but then has used standing doctrine to prevent surface water entities from actually bringing suits based on that right.[128] Regardless, it is clear that changes must be made if surface water entities and their customers will be able to have their cases against groundwater users adjudicated on the merits. Though change is unlikely, both the legislature and the judiciary have the ability to ensure that surface water entities will not be barred from judicial relief due to lack of standing.

V. IF SURFACE WATER IRRIGATORS SHOULD BE ABLE TO SUE, WHAT CHANGES CAN BE MADE?

A. Legislative Intervention

The legislature has the authority to modify Nebraska's standing doctrine via statute and clarify which individuals and entities are able to obtain relief under the *Restatement (Second) of Torts* approach adopted in *Spear T Ranch*. As noted earlier, Nebraska's standing doctrine is purely prudential and does not exist for any constitutional reason.[129] In federal cases, Congress is able to modify prudential standing doctrine at its leisure so long as it does not affect Article III standing.[130] Since the Nebraska judiciary is not bound by Article III, the Nebraska legislature could modify existing statutory language or create entirely new statutes that would partially or completely abrogate standing doctrine in regard to surface water entities and surface water irrigators. It could also statutorily adopt and clarify the scope of the *Restatement (Second) of Torts* approach or take other actions that would serve to either clarify the role of the judiciary or work toward fixing the underlying issues that give rise to disputes between ground and surface water irrigators. As noted above, it is unlikely the legislature will intervene given the disproportionately large number of groundwater irrigators in Nebraska.[131] Nevertheless, the legislature can theoretically choose to act apart from the judiciary in this area.

128. *See* Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Natural Res. Dist., 280 Neb. 533, 788 N.W.2d 252 (2010); Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).

129. *See generally* NEB. CONST. art. 5, § 1–31.

130. Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth v. Sedlin, 442 U.S. 490, 498 (1975)).

131. *Agricultural Irrigation*, *supra* note 12.

B. Judicial Intervention

In the absence of legislative action, the Nebraska Supreme Court could choose to overrule their previous decisions and treat surface water entities in a different manner. It is true that Nebraska courts generally follow the principle of stare decisis.[132] However, the United States Supreme Court, which also routinely abides by the doctrine, has occasionally overruled itself.[133] Similarly, the Nebraska Supreme Court has acknowledged that stare decisis is not absolute. As dicta in *Bronson v. Dawes County* notes, "[T]he doctrine of stare decisis was never intended to indefinitely perpetuate erroneous decisions."[134] The court continued, "The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so."[135] In summary, the Nebraska Supreme Court can, if it so chooses, overrule its previous decisions and modify the doctrine or apply it in a way that would allow surface water irrigators to have more reliable access to the judiciary. However, doing so would all but require the court to cite a change of circumstances or reason why the previous decisions were wrong.[136] Since the circumstances appear to be substantially identical and there is little reason to think the court believes it is wrong, such a change is unlikely in the short term.

VI. CONCLUSION

The extent to which Nebraska surface water irrigators can assert their rights against others is unclear. The legislature has not clarified how to solve the disputes between groundwater and surface water users over hydrologically connected water resources. Meanwhile, the Nebraska judiciary has recognized the potential existence of a claim against groundwater users but has indicated that surface water entities are largely ineligible to bring those claims. It is debatable whether it is good public policy to allow surface water entities to pursue litigation on this issue. However, the Nebraska Supreme Court is at a crossroads. The court must choose between continue adhering to the status quo, either through the current or modified legal posture, or deciding cases dealing with water quantity and surface water entities

132. Bronsen v. Dawes Cty., 272 Neb. 320, 335, 722 N.W.2d 17, 28 (2006).
133. *Compare, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the notion of "separate but equal"), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1955) (overturning *Plessy*).
134. *Bronsen*, 272 Neb. at 335, 722 N.W.2d at 28 (citing Holm v. Holm, 267 Neb. 867, 678 N.W.2d 499 (2004)).
135. *Id.*
136. *Id.*

on the merits. Whatever route is taken, the Nebraska Supreme Court's action or inaction will have far-reaching consequences for all Nebraska water users and impact the continued viability of Nebraska's surface water irrigation.